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November 3, 1998

VIA HAND DELIVERY

Mr. David Waddell  
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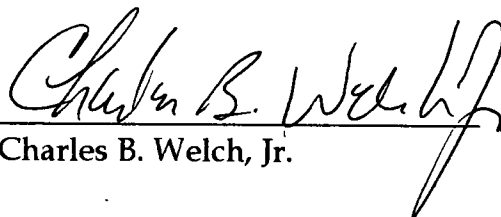
RE: Application of Electric Power Board of Chattanooga  
for a Certificate of Public Convenience and Necessity  
to Provide Intrastate Telecommunications Services  
TRA Docket No. 97-07488

Dear Mr. Waddell:

Please find enclosed the original and thirteen copies of the Tennessee Cable Telecommunications Association's Post Hearing Brief for filing in the above referenced matter. Copies are being served on parties of record.

If you have any questions or concerns regarding this matter, please do not hesitate to contact me.

Very truly yours,

By:   
Charles B. Welch, Jr.

CBWjr:cg  
cc: Parties of Record  
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**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

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**IN RE:**

<b>APPLICATION OF ELECTRIC</b>	)	
<b>POWER BOARD OF CHATTANOOGA</b>	)	
<b>FOR A CERTIFICATE OF PUBLIC</b>	)	<b>DOCKET NO.</b>
<b>CONVENIENCE AND NECESSITY</b>	)	<b>97-07488</b>
<b>TO PROVIDE INTRASTATE</b>	)	
<b>TELECOMMUNICATIONS SERVICES</b>	)	

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***TENNESSEE CABLE TELECOMMUNICATIONS  
ASSOCIATION POST-HEARING BRIEF***

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The Tennessee Cable Telecommunications Association ("TCTA"), through counsel, submits this post-hearing brief for consideration by the Tennessee Regulatory Authority ("TRA"), as follows

**I. BACKGROUND**

The Electric Power Board of Chattanooga ("EPB") filed its initial application, exhibits and pre-filed testimony on October 24, 1997. The initial application came before the TRA on April 23, 1998, for a hearing, but was continued pending the EPB's supplemental documentation concerning the applicant's technical and managerial capabilities in order to demonstrate compliance with T C A §65-4-201(c).

On September 4, 1998, the EPB filed its amended and restated application (the "Application") along with its additional and revised pre-filed testimony. On October 13, 1998, the application came before the TRA and was heard upon the application and exhibits and the pre-filed testimony of the EPB and the TCTA. At the conclusion of the hearing, the Directors of the TRA requested post-hearing briefs to address the issues raised during the hearing.

The EPB's application is based upon a joint venture or partnership arrangement between the

EPB and Globe Telecommunications, Inc (“Globe”) Pursuant to the terms of the agreement creating this relationship, Globe and the EPB will jointly provide the necessary capital, technical expertise, and management to conduct the EPB’s telecommunications division operations The proposed term of the joint operation is for ten (10) years with an early buy-out provision at the end of year seven This proposed working arrangement between the EPB and Globe raises certain critical issues which are discussed in this post-hearing brief

## **II. ISSUES PRESENTED**

A Does the EPB possess the requisite authority to enter into a joint venture or a partnership agreement with Globe Telecommunications, Inc , a private, for-profit corporation, for the purposes of providing telecommunications services in the State of Tennessee?

B Is Globe required to make application and obtain a certificate of convenience and necessity as a condition precedent to providing of the services proposed in its agreement with the EPB?

C Should the EPB be required to provide access to its network for interconnection and non-discriminatory access to all rights-of-way?

D Does the EPB meet the requirements of T C A §65-4-201(c)?

E Should the TRA adopt the affiliate transaction requirements and the Code of Conduct presented in the Joint Filing as well as authorize annual affiliate transaction audits of EPB in order to satisfy the anti-competitive cross-subsidy concerns addressed in T C A 7-52-402

## **III. BRIEF CONCLUSION**

The EPB’s application proposes a joint venture or partnership between a municipality, Chattanooga, and a private company, Globe which is not authorized or permitted by law Pursuant

to the terms of the agreement creating this relationship, EPB and Globe will together provide the necessary capital, technical expertise, and management to conduct the EPB's telecommunications division operations. This proposed working arrangement between EPB and Globe is not authorized by law and, therefore, prohibited. If a joint venture or partnership were allowed by statute, Globe as a private, for-profit telecommunications company would be required to obtain a certificate of convenience and necessity. EPB should be required to provide nondiscriminatory access to its fiber optic network, despite EPB's claims to the contrary. The current application submitted by EPB fails to meet the requirements of the Tennessee Code Annotated by failing to prove the technical and managerial capabilities necessary to obtain a Certificate of Convenience and Necessity.

#### IV. ARGUMENT

- A     *The Tennessee General Assembly has not expressly granted the EPB authority to enter into a joint venture or partnership agreement with a private, for profit entity, for the purpose of providing telecommunications services and, therefore, as a municipal corporation, the EPB is prohibited from providing those services through such an arrangement.*

The TRA must consider the fundamental jurisdictional issue of whether it has the authority to approve the application for a certificate of convenience and necessity as proposed by the EPB and Globe. The EPB proposal contemplates providing telecommunications services through a joint venture or partnership between the EPB and Globe. The EPB, as a municipal corporation and local governmental entity, does not have the authority to enter into a joint venture or partnership agreement with a third-party, private corporation for these purposes.

The EPB is a part of and owned by the City of Chattanooga, a municipality, and, as such, is

a local governmental entity subject to all rights, privileges and obligations applicable to local government (*DePriest* at Pg 31, Lines 14-25 and Pg 32, Lines 1-4 ) As a local governmental entity, the EPB is a political subdivision and an agent or an arm of the State *Scates vs. Board of Com'rs of Union City*, 196 TN 274, 265 S W 2d 563 (Tenn 1954) As a political subdivision of the State of Tennessee, the EPB may only exercise such power and authority directly or expressly delegated to it by the State through the legislative action of the Tennessee General Assembly In *City of Lebanon vs. Baird*, 756 S W 2d 236 (Tenn 1988), the Tennessee Supreme Court succinctly stated this well established rule of law as follows

“In the almost 200 years of this State’s existence, a substantial and comprehensive body of law controlling the exercise of municipal powers has evolved Fundamental in this law is that municipalities may exercise only those express or necessarily implied powers delegated to them by the Legislature in their charters or under statutes e g , *Barnes vs. City of Dayton*, 216 Tenn. 400, 410, 392 S.W.2d 813, 817 91965); *Adams v. Memphis & Little Rock R.R. Co.*, 42 Tenn. 645, 654 (1866). As the Court of Appeals stated in *Warren v. Bradley*, 39 Tenn. App. 451, 459, 284 S.W.2d 698, 702 (1955), ‘it is universally recognized that municipal corporations can exercise no powers which are not in express terms, or by reasonable intendment, conferred upon them, and hence have no power [to do an act], in the absence of a charter provision or statutory enactment empowering them to do so either in express terms or by necessary implication ”

Prior to the enactment of T C A §7-52-401, municipally owned electric utilities did not possess the authority to petition the TRA for a certificate of convenience and necessity to provide telecommunications services in this State In order to analyze the authority of the municipality to engage in the business of provisioning telecommunications services, this section must be carefully considered This section provides in pertinent part as follows

“Every municipality operating and (sic) electric plant, whether pursuant to this chapter or any other public or private act or the provisions of the charter of the municipality, county or metropolitan government, has the power and is authorized, on behalf of its municipality acting through the authorization of the board or supervisory body having

responsibility for the municipal electric plant, to acquire, construct, own and improve, operate, lease, maintain, sell, mortgage, pledge, or otherwise dispose of any system, plant or equipment for the provision of telephone, telegraph, telecommunications services, or any other like system, or equipment A municipality shall only be authorized to provide telephone, telegraph or telecommunications services through its board or supervisory body having responsibility for the municipality's electric plant ” (emphasis added)

The express language of this enabling legislation does not include the authority to delegate or contract away management responsibilities or revenues by way of a joint venture arrangement. Just as the municipality did not have authority to seek authority to provide telecommunications services until authorized by state law, the municipality does not have authority to joint venture or partner its telecommunications business operations, since such arrangements are not expressly authorized, or necessarily inferred, by state law.

Currently, the EPB's authority is limited to the parameters of T C A §7-52-401 which expressly limits the municipality's authority to provide telecommunications services through its “board or supervisory body.” The proposed agreement entered into between the EPB and Globe embraces a scheme of joint management and control of the telecommunications operations and a sharing of the revenues derived from those operations (Globe contract). Obviously, T C A §7-52-401 confers the authority to the municipality to engage in the business of providing telecommunications services. The joint venture arrangement proposed by the EPB, however, represents an unauthorized manner of implementing this authority. In *City of Lebanon, Tennessee vs. Baird, supra*, the Court recognized that the municipality's action must be consistent with the “mandatory provisions” of its enabling legislation as follows:

“Thus, the law recognizes a difference between the existence of a municipal power and the manner or mode of exercising municipal power legitimately. Compare *City*

*of Chattanooga vs. Tennessee Electric Power Co.*, 172 TN 524, 112 S W 2d 385 (Tenn 1938), (existence of power) with *Rutherford v. City of Nashville*, 168 TN 499, 79 S W 2d 581 (1935) (manner of exercise) As this Court observed in *Memphis Street Ry. Co. vs. Rapid Transit Co.*, 138 TN 594, 607-608, 198 S W 2d 890, 893 (1917), 'It is to be observed that power existing in a municipality to [do the act] in question, but it was limited or qualified as to the mode of exercise So it is in the case under review, power to act, proceeding properly was not lacking, but the limitations on its exercise were not regarded " *Id* at 241

In *Brooks vs. Garner*, 566 S W 2d 531, 532 (Tenn 1978), the court discussed the reasons for the strict application of the rule that the municipality operate within its express authority to perform an act The Court reasoned that the citizens of a municipality should be adequately notified of a government action and its costs can be given an opportunity to voice opposition prior to "the City's commitment to it" *Id* at 532 In *Warn vs. Bradley, supra*, the court noted that "municipalities are trustees for their citizens" and, as any other fiduciary, is obligated to make full disclosure *Id* at 704 Although joint venturing and partnering between municipalities and private business has been the subject of much debate during the past two legislative sessions of the Tennessee General Assembly, the question has not been resolved and no such authority has been delegated to local governmental entities

Black's Law Dictionary Rev 4th Ed defines joint venture as follows

"An association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill, and knowledge A 'joint adventure' while not identical with a partnership, is so similar in its nature and in the relations created thereby that the rights of the parties as between themselves are governed practically by the same rules that govern partnerships

In *Fain vs. O'Connell*, 909 S W 2d 790 (Tenn 1995), the Tennessee Supreme Court adopted the definition of joint ventures set forth in 30 AmJur, p 939, Sect 2, as follows

"A joint venture is an association of persons with intent, by way of contract, express

or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill, and knowledge, but without creating a partnership in the legal or technical sense of the term, or a corporation, and they agree that there shall be a community of interest among them as to the purpose of the undertaking, and that each co-adventurer shall stand in the relation of principal, as well as agent, as to each other of the other co-adventurers, with an equal right of control the means employed to carry out the common purpose of the adventure ”

Common interest, purpose and equal right of control are essential components of a joint venture *Id.* at 793

Pursuant to the provisions of the agreement between Globe and the EPB, each party is obligated to make a capital contribution to the venture and supply management employees (*Nyswanger* at Pg 73, Lines 8-24 and Pg 80, Lines 21-22 ) As the return on their investment of capital and management, the parties propose to share in revenues derived from the operations of the telecommunications division (*Nyswanger* at Pg 69, Lines 15-17) Clearly, the arrangement between the EPB and Globe constitutes a joint venture or partnership Each of the essential components of a joint venture are present, common interest and purpose and right of control

The structure of the entity or entities proposed by the EPB to offer telecommunications services is critical to this proceeding The EPB has no authority to conduct its telecommunications operations through a private, third-party, and the proposal must be rejected The issue is jurisdictional in nature The TRA cannot through its regulatory authority confer or create a right to a local governmental entity The authority to delegate power to a municipality is vested exclusively in the State Legislature

B *Pursuant to the terms of its contract with the EPB, Globe is obligated to provide telecommunications services in the State of Tennessee, which require prior regulatory approval through the issuance of a*



*Certificate of Convenience and Necessity.*

Globe is and has been since its creation a telecommunications company which has enjoyed a successful industry track record. The company is capable of providing local exchange services and is certified as a competing local exchange carrier in multiple service areas in Georgia and Alabama (Nyswanger at p. 79, line 9-18)

By agreement with the EPB, it is proposed that Globe provide the core telephony operations for the EPB. These operations include installing, operating and servicing a switch, billing and customer services. It is proposed that the EPB will provide its fiber-optic network, marketing and network maintenance (Globe Contract). This proposed concept of providing telecommunications services is very similar, if not identical, to other CLEC operations which provide services by providing a switch and purchasing unbundled network elements from other companies, generally incumbent local exchange carriers. In these instances, the CLEC provides its own switch, billing and customer services and purchases unbundled loops from other carriers such as BellSouth. In other words, the CLEC provides its own switching and backup operations and the carrier, from which unbundled network elements are purchased, provides transport. This is identical to the EPB proposal. On cross-examination, EPB witness Douglas A. Dawson admitted that the EPB would be providing and solely responsible for only the transport function of the overall telecommunications operations (p. 89, lines 5-24)

Pursuant to the provisions of the agreement between Globe and the EPB, each entity assumes and reserves certain obligations and privileges. Each entity operates, in large part, independent of the other and provides separately identifiable management functions. It is proposed that the EPB will be subject to the regulatory supervision of the TRA and that Globe will not be subject to such

regulation. If the TRA approves the proposed EPB/Globe arrangement, it will permit Globe to enter Tennessee telecommunications markets without first obtaining a Certificate of Convenience and Necessity to provide such services. To date, the TRA has required every other company seeking to provide these type services to first obtain its regulatory approval and authority. This unprecedented concept is inequitable to other carriers who are required to bear the costs of regulatory compliance, and it represents a risk to the quality of telecommunications services to the end-user customer. Since the proposed EPB/Globe agreement allows for Globe, in all material respects, to operate independent of the EPB, Globe has no obligation to comply with TRA rules and regulations, and neither the EPB nor the TRA has any authority to ensure such compliance.

The law in this State is quite clear that all telecommunication service providers must obtain authority before providing its services as contemplated by state law and TRA rule. T C A § 65-4-201(b) requires every entity to obtain authority from the TRA before offering or providing "any individual or group telecommunication services". T C A § 65-4-101(c) defines "telecommunications service provider" as any entity "offering or providing for hire, any telecommunications service, telephone service, telegraph service, paging service, or communications service". Pursuant to the terms of the EPB proposal, Globe will certainly be providing telecommunications services. The TRA should not permit Globe to provide these services without first obtaining the required authority.

C     *The EPB's Application should be denied because the EPB failed to design its network to accommodate federal requirements for interconnection and non-discriminatory access to rights-of-way.*

The Telecommunications Act of 1996 (the "1996 Act") opens up all telecommunications markets to competition and prohibits barriers to entry. 47 U S C § 253. The 1996 Act also sets forth

standards that govern how telecommunications carriers must configure their networks, allow for interconnection, and provide non-discriminatory access to rights-of way in order to further the congressionally mandated goal of developing competition in telecommunications 47 U S C § 251

The 1996 Act imposes a general duty on *all* telecommunications carriers (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers, and (2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established in the 1996 Act 47 U S C § 251(a) The 1996 Act also imposes duties on local exchange carriers to provide for (1) resale capability, (2) number portability, (3) dialing parity, (4) non-discriminatory access to rights-of-way, and (5) reciprocal compensation 47 U S C § 251(b) In particular, local exchange carriers ("LECs") have the duty to "afford access to the poles, ducts, conduit, and rights of way of such carrier *to competing providers of telecommunications services* on rates, terms, and conditions that are consistent with section 224 " 47 U S C § 251(b)(4) Indeed, access to rights-of-way is one of the crucial elements for establishing competitive telecommunications services and thus denial of access would be "barrier to entry" in violation of Section 253 of the 1996 Act *See, e.g., AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F Supp 2d 582 (N D Tex 1998)

The EPB, however, has not designed its network to be accessible to competitors as required by the 1996 Act Although the EPB constructed fiber optic loops consisting of ninety-six fibers (Fugatt Testimony, p 109, lines 2-5), the fiber network will not be accessible to competing telecommunications providers (*Id* at 112, lines 11-24 and 113, lines 9-16) This denial of access will be in derogation of the obligations imposed on telecommunications carriers generally and local exchange carriers specifically

There is no question that EPB would ultimately have to grant access to the network to permit interconnection under 47 U S C § 251(a) but its stated failure to accommodate interconnection at the outset merits denial of its application. In addition, the EPB may be attempting to confer its municipally-owned status on Globe to deny access to municipal rights-of-way that would otherwise be required. Section 251(b)(4) of the 1996 Act requires all LECs to provide access on terms and conditions consistent with Section 224. Section 224, however, exempts municipally-owned "utilities" from the requirements of access and non-discrimination in Section 224. That Section defines the utilities that are subject to its requirements, but exempts, *inter alia*, any entity that is "cooperatively organized or owned by the Federal Government or any State." 47 U S C § 224(a)(1). In this instance, the EPB's network could be exempt from the access requirements of Sections 251(b)(4) and 224, although Globe, if it did not have the shield of EPB's status, could not avoid these federal obligations. Accordingly, certifying EPB to do no more than provide a shield from competition is not in the public interest. Indeed, as an evasion, EPB's certification would be subject to preemption as preventing full compliance with Section 251 and erecting a barrier to entry in violation of Section 253. *See, e.g., Hines v. Davidowitz*, 312 U S 52 (1941) (state law is preempted where it stands as an obstacle to the accomplishment and execution of the full objectives of Congress).

The joint venture appears designed in part to eliminate competitive access that would otherwise be required of Globe thus bringing in to question the motivation to establish a joint venture especially when the EPB's contribution is limited to perhaps this exemption and little else. *See Part A, supra*. Moreover, allowing the EPB's exempt status to shield Globe from competitive access defeats the central tenet of the 1996 Act and will result in lessening of telecommunications competition in Chattanooga. EPB's application must, therefore, be denied.

- D     *The EPB has not satisfactorily demonstrated that it possesses the sufficient managerial and technical abilities to provide telecommunication services as required by T.C.A. § 65-4-201(c)(2).*

If Globe and the EPB presented their application as a single business entity, the applicant might arguably possess sufficient managerial, technical and financial capabilities to qualify as an authorized telecommunications service provider. The application, however, has been presented as a venture between independent parties with only one of the participants seeking certification. Technical and managerial communications expertise will be provided independently by Globe. It is proposed that the EPB will rely upon this expertise, which it does not itself possess. In fact, top level management of the EPB telecommunications division will not even work with Globe management in day-to-day operations. (*Fugatt* at p. 107, l. 10-25 and p. 108, l. 1-25)

As proposed in the EPB application and the Globe contract, the telecommunications division of the EPB will be dependent upon the joint, but independent, capital investment and management of Globe. For the most part, these entities will act independently of each other and exercise control over their respective areas of responsibility. At best, it can be concluded that the EPB only possesses a portion of the technical and management capabilities necessary to provide the telecommunications services for which it seeks a Certificate of Convenience and Necessity to provide. The EPB has not, therefore, met the requirements of T.C.A. § 65-4-201(c)(2) in that it does not possess the requisite managerial and technical capabilities.

- E     *It is imperative that the TRA adopt the affiliate transaction requirements and Code of Conduct presented in the Joint Filing and require an annual affiliate transaction audit of the EPB to be conducted in order to provide reasonable assurance that the EPB is not engaging in anti-competitive cross-subsidy.*

*per T.C.A. §7-52-402.*

The EPB and the TCTA have filed a second revised joint proposal of conditions to which the EPB's Certificate of Public Convenience and Necessity should be subject if it is granted by the TRA as a result of this proceeding. The TCTA believes that it is imperative that the TRA adopt, at a minimum, the second revised set of affiliate transaction requirements and the Code of Conduct in order to comply fully with the prohibition against subsidies found in T C A §7-52-402. Furthermore, in light of the testimony presented by EPB witnesses at the October 13, 1998 hearings, the TRA should authorize and require an annual affiliate transaction audit be conducted of the EPB's electric and telecommunications divisions, in order to provide reasonable assurance that the EPB is not engaging in anti-competitive cross-subsidy.

The senior management of the EPB has been entertaining the idea of providing competitive telecommunications services for some time, even prior to the passage of state enabling legislation authorizing governmental entities to enter the telecommunications market. (Dawson, p. 90, l. 5-7) In its evaluation of the viability of becoming a competing local exchange carrier, the EPB has incurred a substantial level of internal costs as well as costs for outside consultants. In order to avoid anti-competitive cross-subsidy, both the internal costs incurred and the payments made to third-parties on behalf of the telecommunications effort should be separately accounted for from the amounts classified as electric system expenditures.

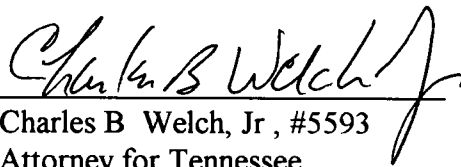
The EPB has not treated the telecommunications-related expenditures, however, separate from those reported as electric system costs. (Dawson, p. 92, l. 9-15) In fact, the EPB's accounting witness testified that only the payments made to external consultants rendering services on behalf of the prospective telecommunications division were separately tracked. (Baxter, p. 98, l. 1-5) Further,

these payments to outside contractors that have been incurred for the benefit of the EPB's telecommunications venture were classified as part of the operating expenses of the regulated electric division (Baxter, p 98, l. 6-12) It is clearly more appropriate for the EPB to account for its telecommunications-related expenditures in an asset account which can be amortized as a telecommunications division asset beginning at the time certification is granted or, alternatively, expensed, if appropriate, as below-the-line expenses (i.e. not included as ratemaking expenses) of the electric division. The experience with the accounting conventions practiced by the EPB with respect to its telecommunications-related expenditures incurred to date makes the annual affiliate transaction audit of the EPB necessary to the TRA regulatory process.

#### **V. CONCLUSION**

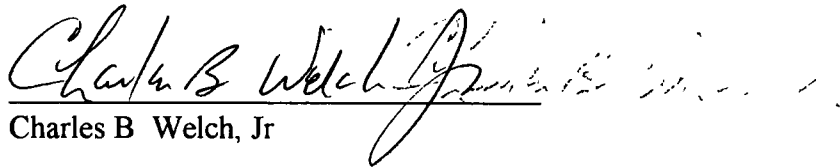
For the foregoing reasons, the Tennessee Cable Telecommunications Association respectfully submits that the Tennessee Regulatory Authority should reject the application of the Electric Board of Chattanooga for a certificate of public convenience and necessity to provide intrastate telecommunications services as it has been proposed.

Respectfully submitted,  
FARRIS, MATHEWS,  
BRANAN & HELLEN, P L C

By   
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**CERTIFICATE OF SERVICE**

I, Charles B Welch, Jr , hereby certify that I have served a copy of the foregoing Tennessee Cable Telecommunications Association Post-Hearing Brief on the parties on the attached list, by depositing copy of same in the U S Mail, postage prepaid this the 3rd day of November, 1998

  
Charles B Welch, Jr

A \POST-HRG BRF



Docket No 97-07488 - Service List

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